United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1918

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

To be argued by
RAYMOND FITZGERALD

UNITED STATES OF AMERICA ex rel.
WILLIAM PIPER,

Appellant,

vs.

PAUL J. REGAN, Chairman, New York
State Board of Parole and HONORABLE
R.J. HENDERSON, Superintendent of
Auburn Correctional Facility,

Appellees.

REPLY BRIEF FOR APPELLANT

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On Appeal from the United States District Court
of the Northern District of New York

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UNITED STATES OF AMERICA ex rel.
WILLIAM PIPER,

Appellant,

-against-

HONORABLE PAUL J. REGAN, CHAIRMAN,
NEW YORK STATE BOARD OF PAROLE,
et al.,

Appellees.

---x

REPLY BRIEF FOR APPELLANT

POINT I

APPELLANT'S PETITION SHOULD BE TREATED AS A CIVIL RIGHTS ACTION

Appellees contend that appellant is bound by the designation of his petition as a request for habeas corpus relief. Regardless of its designation, appellant's pro se petition should have been construed liberally and treated

as a civil rights action not requiring exhaustion of state remedies. Haines v. Kerner, 404 U.S. 519 (1972), See, Brief for Appellant, pp. 6-8.

POINT II

APPELLANT SHOULD NOT BE DENIED RELIEF BY VIRTUE OF THIS COURT'S DECISION IN JOHNSON

Appellees' other contention is that the rule that an inmate is entitled to a statement of reasons for the denial of parole should not be applied to inmates denied parole prior to the decision in Johnson.* Appellees are incorrect. The decision in Johnson, as of this time, may not be employed to deny appellant relief, because the decision in Johnson is not yet final.

A petition for certiorari in Johnson is pending. The decision may be vacated on grounds other than the merits, e.g. mootness. Alternatively, the decision in this case might be appealed to the Supreme Court; heard and decided at the same time as,

* United States ex rel Thomas Johnson v. Chairman of New York State Board of Parole, __F.2d__ Slip Ops. No. 617, p. 4127 at 4129 (2nd Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3095.

or even prior to, Johnson; and the decision applied retroactively both to appellant and Johnson. In fact, the Supreme Court, in its discretion, may choose to hear this case rather than Johnson; grant relief to appellant; and deny relief to Johnson on the grounds of non-retroactivity. See, Desist v. United States, 394 U.S. 244, 255 (1969) (Douglas, dissent). In view of these possibilities, the decision of Johnson cannot be accorded jural effect with respect to retroactivity.

POINT III

APPELLANT SHOULD NOT BE DENIED RELIEF BY REASON OF A NON-RETROACTIVE APPLICATION OF JOHNSON.

Even if Johnson is accorded jural effect with respect to retroactivity, the rule that inmates must be given reasons for the denial of parole should be applied to appellant. Retroactivity is required here under the "foreshadow" doctrine of Berger v. California, 393 U.S. 314 (1969) and the balancing test set forth in Stovall v. Denno, 388 U.S. 293 (1967).

(i) Johnson clearly was foreshadowed by Morrissey and its progeny.

The Supreme Court in Berger considered the retroactivity of its decision in Barber v. Page, 390 U.S. 719 (1968). The State of California argued against retroactivity on the grounds of reliance upon previous standards. The Court rejected California's argument as "most unpersuasive", pointing out that Barber was "clearly foreshadowed, if not preordained" by the Court's decision in Pointer v. Texas, 380 U.S. 400 (1965). Berger, 393 U.S. at 315. In Berger the trial at which Berger was denied his Barber v. Page rights was held more than one year after Pointer. Thus, California could not rely, in good faith, on the old standards.

In this case, appellees also claim reliance on old standards. Appellees' claim, as in Berger, is most unpersuasive. The Johnson decision "was clearly foreshadowed, if not preordained" by the Supreme Court's decision in Morrissey v. Brewer, 408 U.S. 471 (1972). The issue in Morrissey was "whether due process applies to the parole system." Morrissey, 408 U.S. at 477. The Court in holding that due process does apply to the parole system stated that

decision makers must state the reasons for the determination and the evidence upon which they relied. Morrissey, 408 U.S. at 487 and 489.

This is the exact holding of Johnson with respect to parole release hearings. Johnson expressly recognized that Morrissey cast grave doubts upon the validity of the decisions upon which appellees claim to have relied in denying a statement of reasons to appellant. United States ex rel. Johnson v. Chairman, Slip Ops. p. 4127 at 4132. Morrissey was decided on June 29, 1972, almost 1 1/2 years prior to appellant's parole release hearing. Moreover, the District Court decision in Johnson pointed out to appellees, two months prior to appellant's parole release hearing, that Morrissey required that a statement of reasons be given to inmates denied parole. United States ex rel. Johnson v. Chairman, 363 F. Supp. 416 (E.D.N.Y., 1973).

(ii) An application of the Stovall test to the instant case warrants applying Johnson retroactively.

The Supreme Court in Stovall v. Denno, 388 U.S. 293 (1967), established a balancing test for determining whether a rule is retroactive or prospective. A court must balance "(a) the purpose to be served

by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall, 388 U.S. at 297. The purpose of the requirement of reasons enunciated in Johnson affected the very integrity of the fact finding process and, therefore, Johnson should be applied retroactively regardless of appellee's alleged reliance on old standards or the alleged burden upon appellees. Arsenault v. Massachusetts, 393 U.S. 5 (1968); McConnell v. Rhay, 393 U.S. 2 (1968); Witherspoon v. Illinois, 391 U.S. 510, 523 n. 22 (1968).

As we have indicated, appellees' claim of reliance lacks substance. The application of Johnson retroactively will place much less of a burden upon the parole board than appellees suggest. The figures cited by appellees are misleading. The relevant figures are not the number of parole release hearings held, but rather the number of parole release hearings held in which the inmate is denied parole. In 1972, for example, 75.4% of the inmates appearing before the New York State Parole Board

were granted parole. United States ex rel. Johnson v. Chairman, Slip Ops., p. 4127 at 4132-4133. Thus, less than one quarter of the number of cases cited by appellees would be affected. In addition, relief probably will not be sought by the many inmates denied parole, but subsequently released.

Morrissey and Wolff v. McDonnell, __U.S.__, 41 L.Ed. 2d 935 (1974) cited by appellees are distinguishable from the instant case. With respect to Wolff, the Supreme Court only held that its decision would not be applied retroactively to expunge prison records containing determinations of misconduct. Prison records containing previous determinations of misconduct do not affect the integrity of the fact finding process.

Morrissey, as cited by appellees, is inapposite. Morrissey was the first case to decide that due process was applicable to the parole system. Claims of reliance on old standards in Morrissey were entitled to weight in the balancing process. Moreover, Morrissey required a panoply of due process rights including two hearings, written notice of the claimed violations, disclosure of evidence to the accused, opportunity to be heard in person and to

present witnesses and documentary evidence, the right to cross-examine adverse witnesses, a neutral hearing body and a written statement of the reasons and the evidence relied upon in reaching the decision. To have applied Morrissey retroactively would have placed an overwhelming burden upon the parole system. To apply Johnson retroactively will impose no such problem.

CONCLUSION

WHEREFORE, FOR THE REASONS STATED ABOVE, AND IN THE BRIEF FOR APPELLANT, APPELLANT RESPECTFULLY REQUESTS THAT THE JUDGMENT OF THE COURT BELOW BE REVERSED AND THAT THE PAROLE BOARD BE DIRECTED TO FURNISH APPELLANT WITH A STATEMENT OF REASONS FOR THE DENIAL OF PAROLE.

Respectfully submitted,

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Raymond Fitzgerald

Of Counsel

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

SIMON LUK being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 200 Park Avenue, New York, New York 10017. That on the 15th day of October, 1974, deponent served the within Reply Brief for Appellant upon Louis J. Lefkowitz at Two World Trade Center, New York, New York 10047 by depositing true copies of same enclosed in a posted properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Simon Luk

SIMON LUK

Sworn to before me this
15th day of October, 1974.

Raymond L. Fitzgerald

RAYMOND L. FITZGERALD
Notary Public, State of New York
No. 31-4503159
Qualified in New York County
Commission Expires March 30, 197